No. 81-6756

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

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MELVIN E. TUTEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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## QUESTION PRESENTED

Whether a conviction for which a youth serves a term of probation pursuant to section 5010(a) of the Federal Youth Corrections Act, and receives an unconditional discharge from the program, may be used years later as the basis for imposing a recidivist felony penalty.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 6 |
| I. The Decision Below Affirming the Trial Court's Imposition of a Recidivist Sentence Conflicts Directly with the Decision of the United States Court of Appeals for the Fifth Circuit in Which that Court Rejected an Effort to Use a Prior FYCA Conviction as the Basis upon Which to Impose a Recidivist Penalty | 6 |
| II. The Decision of the District of Columbia Court of Appeals Hampers Administration of the Federal Youth Corrections Act and Generates Confusion as to the Intent and Meaning of the FYCA | 10 |
| CONCLUSION | 12 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **CASES:** | |
| Dorszynski v. United States, 418 U.S. 424 . . . . . | 10 |
| United States v. Arrington, 618 F.2d 1119 (5th Cir. 1980), cert. denied, 449 U.S. 1086 . . . . | 6,7,8,9 |
| United States v. Beach, 324 U.S. 193. . . . . | 10 |
| United States v. Sinkfield, 484 F. Supp. 595 (N.D. Ga. 1980) . . . . . | 8 |
| United States v. Villar, 416 F. Supp. 887 (S.D. N.Y. 1976). . . . . | 8 |
| **STATUTES:** | |
| 18 U.S.C. § 1202(a)(1) . . . . . | 6,8 |
| 18 U.S.C. § 5005 et seq. . . . . | 2,4 |
| § 5010 . . . . . | 2,7 |
| § 5010(a). . . . . | 2,4 |
| § 5010(b). . . . . | 2,6,7 |
| § 5010(c). . . . . | 2,7 |
| § 5021 . . . . . | passim |
| 22 D.C. Code § 3204. . . . . | passim |
| 23 D.C. Code § 111 . . . . . | 3,5 |
| **OTHER AUTHORITIES:** | |
| Stern and Gressman, Supreme Court Practice, 5th ed. 1978 - 9 | |

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The petitioner, Melvin E. Tuten, prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals, entered on March 30, 1982.

## OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 440 A.2d 1008, and is set out below in the Appendix at pp. 1a-6a. The per curiam Order of that court, denying Tuten's petition for rehearing en banc, is not reported. That Order is set out below in the Appendix at page 18a.

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 10, 1982. A petition for rehearing en banc was denied on March 30, 1982, and is set out in the Appendix at page 18a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## STATUTES INVOLVED

A. The Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq. (1976). Pertinent provisions are:

§ 5010. Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

* * *

§ 5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

B. 22 D.C. Code § 3204. Carrying concealed weapons.

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever

violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

C. 23 D.C. Code § 111. Proceedings to establish previous convictions

(a)(1) No person who stands convicted of an offense under the laws of the District of Columbia shall be sentenced to increased punishment by reason of one or more previous convictions, unless prior to trial or before entry of a plea of guilty, the United States attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the previous convictions to be relied upon. Upon a showing by the Government that facts regarding previous convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years, unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) If the prosecutor files an information under this section, the court shall, after conviction but before pronouncement of sentence, inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information and shall inform him that any challenge to a previous conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c)(1) If the person denies any allegation of the information of previous convictions, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the prosecutor. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the Government to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwide provided

in paragraph (2) of this subsection, the prosecuting authority shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a previous conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of previous convictions, the court shall proceed to impose sentence upon him as provided by law.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the prosecutor, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by law. The person may appeal from an order postponing sentence as if sentence has been pronounced and a final judgment of conviction entered.

## STATEMENT OF THE CASE

On November 16, 1970, Melvin E. Tuten, petitioner, then nineteen years old, was found guilty in the District of Columbia Court of General Sessions of carrying a pistol without a license (22 D.C. Code § 3204). He was sentenced under the Federal Youth Corrections Act (FYCA), 18 U.S.C. § 5005 et seq.(1976), and placed on probation for two years (18 U.S.C. § 5010(a)). Following that two-year probationary period, Tuten was discharged unconditionally from the FYCA program. Tuten did not apply for a certificate setting aside his FYCA conviction, as is provided in section 5021(b) of the Federal Youth Corrections Act, and no such certificate was issued by the sentencing judge.

Tuten had no further difficulty with the law until November 24, 1979. On that date, he was arrested and charged with carrying a pistol without a license. At a preliminary hearing held on December 3, 1979, however, the court found no probable cause and Tuten was discharged.

Seven months later, on June 19, 1980, a two-count indictment was filed charging Tuten with assault with a dangerous weapon (a stick) and carrying a pistol without a license. Both offenses were allegedly committed on November 23, 1979.

Sometime after October 1, 1980, the Government informed the court below, pursuant to 23 D.C. Code § 111, that Tuten had previously been convicted of carrying a pistol without a license and was therefore subject to the increased, recidivist penalty provided by section 3204. The previous conviction relied upon by the Government in its information was the 1970 offense for which Tuten had been sentenced under the Federal Youth Corrections Act. The increased penalty provided in section 3204, in effect, makes the possession of an unlicensed gun a felony rather than a misdemeanor.

Tuten's trial began on November 26, 1980. The following day, the jury found him not guilty of assault with a dangerous weapon, but guilty of carrying a pistol without a license. Sentencing was originally scheduled for January 5, 1981. Following a brief meeting on that date, however, sentencing was postponed to allow for the completion of another separate and subsequent criminal proceeding in which Tuten was the defendant before the same judge. At the abbreviated January 5 hearing, trial counsel first raised the issue of whether Tuten could properly be charged as a recidivist based on his prior FYCA conviction.[1/]

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1/ The transcript of this discussion is contained in the Appendix, pp. 7a-10a.

On January 26, 1981, notwithstanding a favorable pre-sentence report, over objection by trial counsel that use of the recidivist penalty was wrong, and after the Government misrepresented Tuten's prior criminal record,[2] Tuten was given a felony sentence of not less than two nor more than six years. The sentencing judge remarked at the time that the question of whether a repeat-offender sentence could be imposed on the basis of a prior FYCA conviction would be "an interesting point for the court of appeals." (Tr. 6, App. 16a.)

## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Affirming the Trial Court's Imposition of a Recidivist Sentence Conflicts Directly with the Decision of the United States Court of Appeals for the Fifth Circuit in Which that Court Rejected an Effort to Use a Prior FYCA Conviction as the Basis upon Which To Impose a Recidivist Penalty.

In United States v. Arrington, 618 F.2d 1119 (5th Cir. 1980), cert. denied, 449 U.S. 1086, John Arrington was convicted of violating 18 U.S.C. App. § 1202(a)(1)(1976), a law similar to D.C. Code § 22-3204, which forbids the possession of firearms by a convicted felon. The sentence Arrington had served for the prior felony conviction on which the violations of section 1202 were based was the maximum term of custody provided by section 5010(b) of the FYCA, six years of treatment and supervision. Following completion of that six-year term, Arrington had been unconditionally discharged.

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2/ The prosecuting attorney, without any basis in fact, suggested that Tuten had a long history of criminal activity, stating Tuten's "record certainly reflects a period of lascivious activities with respect to him carrying pistols on other numerous arrests." Sentencing Transcript, p. 5 (App. 15a), emphasis added. The transcript of the January 26, 1981 sentencing proceeding is reproduced in the Appendix at pages 11a-17a. Citations will be made to the original Transcript and to the Appendix page.

Given the nature of the underlying conviction, Arrington appealed the section 1202 recidivist conviction, arguing that since he had been given an unconditional discharge following his completion of the FYCA sentence imposed for the prior felony, "he no longer bore the onus of that conviction and consequently should not have been charged [as a previously convicted felon.]" 618 F.2d at 1121. In making this argument, Arrington relied upon section 5021(a) of the FYCA which provides for the issuance of a certificate setting aside the conviction of a committed youth offender who was unconditionally discharged from supervision "before the expiration of the maximum sentences imposed upon him."

Although the language of section 5021(a) would appear to limit the benefits of set-aside to those youthful offenders unconditionally released prior to the expiration of the maximum sentence imposed upon them, the Fifth Circuit (Fay, J., in which Wisdom and Tate, JJ., joined) agreed with Arrington and held that his unconditional discharge following satisfactory completion of an FYCA sentence less than that which could have been imposed under the provisions of the FYCA entitled him to the benefits of section 5021(a).

> Having a broad range of sentencing options available, the trial court in Arrington's case would have taken into account the mandatory discharge provision before choosing the appropriate sentence. As a matter of discretion, the judge could have sentenced Arrington to probation under 18 U.S.C. § 5010(a) (1976). Alternatively, he could have sentenced him under section 5010(c) to treatment for longer than six years, up to the maximum adult offender sentence for the offense charged. Finally, the trial court could have chosen not to sentence Arrington under the Youth Corrections Act, but rather as an adult offender. 18 U.S.C. § 5010(d)(1976). The trial judge considered all these options and chose to sentence under section 5010(b), which has a maximum sentence of six years. . . . Expunction of Arrington's conviction was clearly automatic after his unconditional discharge at the end of six years.
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> Not only does the clear statutory language command this result, but so also does the policy underlying the Youth Corrections Act.

618 F.2d at 1123-24; citations omitted.

The court determined that this result was dictated by the purposes of the FYCA, concluding (618 F.2d at 1124; citations and footnotes omitted):

> The Youth Corrections Act actually operates to remove certain youthful offenders from the realm of those persons who have been convicted of a felony. The Act's import is to remove the taint of youthful indiscretions, giving a youthful offender a second chance to live free of the lifelong ignominy of a criminal record. If a youthful offender has been unconditionally discharged, the disabilities of a criminal conviction are completely and automatically removed; indeed, the conviction is set aside as if it had never happened.

Thus the court ruled that satisfactory completion of the FYCA sentence imposed upon Arrington has erased that prior felony conviction, at least so far as the application of a recidivist penalty provision such as section 1202 is concerned.

In United States v. Villar, 416 F. Supp. 886 (S.D.N.Y. 1976), and United States v. Sinkfield, 484 F. Supp. 595 (N.D. Ga. 1980), it was also held that youth offenders who complete probationary terms imposed under the FYCA are entitled to be free of the taint of a prior conviction. In Sinkfield, the court stated that "upon successful completion of his probationary period, defendant Sinkfield will be entitled to a certification, pursuant to 18 U.S.C. § 5021 setting aside his conviction," 484 F. Supp. at 598. In Villar the court found that the defendant's conviction "would be automatically set aside upon his discharge from probation." 416 F. Supp. at 889.

Compare the law of the Fifth Circuit with what now appears to be the law of the District of Columbia. Section 5021(b) of the FYCA provides the same set-aside benefits for those sentenced to probationary terms as section 5021(a) does for those whose FYCA sentences involve more serious detention. Like Arrington, Tuten contends that having been unconditionally discharged from the FYCA program upon the completion in 1973 of his probationary term, he no longer bore the onus of that conviction and could not, in 1980, be charged as a repeat defender.

The court below refused to accept this result, but made no effort to distinguish Arrington, merely dismissing it as based on "unpersuasive authority . . ." and contrary to the legislative history of the set-aside provision. The court below bases this latter contention, however, on House Report language that is perfectly consistent with Arrington and supportive of petitioner's position:

> The report states that the youth offender must be discharged "unconditionally on or before the expiration of the maximum term fixed by the sentencing judge."

440 A.2d at 1010-1011 (first emphasis added, second in text; citations and footnotes omitted), App. 3-4a.

There could not be a more direct conflict between the law of the Fifth Circuit and the law of the District of Columbia. Nor can the need for review be more compelling: Tuten, who was given the mildest type of sentence provided by the FYCA is jailed as a recidivist; Arrington, who committed a felony and served a term three times as long as Tuten's, is not. The confusion as to whether and when prior FYCA convictions may be used to trigger an enhanced recidivist penalty affects every state and every federal district court since recidivist statutes are present in the law of virtually every state as well as in federal law.[3/]

An established reason for the grant of certiorari is the presence of a direct conflict between the decision of a federal court of appeals and that of the highest court of any state where the conflict concerns federal questions. See Stern & Gressmen, "Supreme Court Practice," 5th ed. 1978, p. 280, and cases cited therein. Since this case involves the construction and effect given to the Federal Youth Corrections Act, an important federal issue is presented -- one that warrants review by the Court.

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3/ On March 22, 1982, the Court granted review in the case of Dickerson v. New Banner Institute, Inc., No. 81-1180. The question presented in that case is whether or not the firearms disabilities imposed by the Gun Control Act, the same federal Act at issue in Arrington, are applicable to a person whose prior felony conviction was expunged under state law following successful probation. The Fourth Circuit held that the operation

[Footnote continued on next page.]

II. The Decision of the District of Columbia Court of Appeals Hampers Administration of the Federal Youth Corrections Act and Generates Confusion as to the Intent and Meaning of the FYCA.

This Court has held that an important question raised by the District of Columbia Court of Appeals' application of a federal statute to the District is a proper basis for the grant of certiorari. United States v. Beach, 324 U.S. 193 (application of the Mann Act to the District). In this case, the court below has construed the FYCA and a District of Columbia recividist statute in such a way that the purposes of the FYCA are defeated and the recidivist statute is imposed upon individuals never before subjected to or deserving of the harsh treatment provided by section 22-3204.

The Federal Youth Corrections Act was enacted in 1950 to provide a program of individualized attention for youthful offenders in the hope that by responsive early intervention, young people could be prevented from becoming habitual criminals. In Dorszynski v. United States, 418 U.S. 424, 432-3, the Court described the Federal Youth Corrections Act as the most comprehensive federal statute concerning sentencing and found that the FYCA was "designed to provide a better method of treating young offenders convicted in federal courts in that vulnerable age bracket [18-22] to rehabilitate them and to restore them to normal behavior patterns," Section 5021 is a "powerful tool" in this rehabilitation program, providing the means by which an offender's past criminal activity can be erased from his record. 418 U.S. at 434.

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[Footnote continued from previous page.]

of the State law expungement precluded any subsequent use of the earlier felony conviction, citing Arrington as support by analogy. 649 F.2d at 220. Although the issue presented in the instant case is different than the question posed in New Banner, they are related to the extent of their reliance on the Fifth Circuit's decision in Arrington.

In affirming the propriety of Tuten's recidivist sentence, the court below declared:

> Since the enhanced penalty depends on the type of prior conviction, not on the type of sentence received for the prior conviction, it appears obvious that two persons with the same prior-convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under the FYCA and the other was not.

440 A.2d at 1012, App. 5a. If this is true, then the Federal Youth Corrections Act and the policies it represents are meaningless.

The court below made the foregoing statement in the posture of construing section 3204 of the District of Columbia Code, but there is no basis for distinguishing this District of Columbia recidivist provision from the many other federal and state provisions authorizing enhanced penalties for recidivists. In all such situations, the basic question remains: Do past FYCA convictions subject an offender to being characterized as recidivist upon the commission of a later offense? The purposes of both the FYCA and recidivist penalty provisions are served by answering that question as the Fifth Circuit did in Arrington. The contrary negative determination reached by the court below leaves in conflict the law to be applied by sentencing judges and charging prosecutors throughout the country, resulting in uncertainty and confusion.

If for no other reason than to make clear the operation and effect of the FYCA, Tuten's petition should be granted.

## CONCLUSION

The guidance of this Court is essential to ensure equitable and meaningful treatment for youthful offenders sentenced under the Federal Youth Corrections Act. Accordingly, the petition for certiorari should be granted.

Respectfully submitted,

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